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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. HUMBERTO DIAZ et al., Defendants and Appellants.	C057586 (Super. Ct. No. 06F00542)

Defendants Humberto Diaz and Jamual Broadbent were each convicted of three counts of attempted murder arising out of a gang-related shooting in January 2006. On appeal, they raise numerous challenges to their convictions. We reject them, except that we do agree Broadbent was shorted two days of presentence custody credits. Accordingly, we will so modify Broadbent's judgment and affirm it as modified and we will affirm Diaz's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2006, Dorrate Hicks, who was 15 or 16 years old at the time, was walking from his house near 26th Avenue and

Martin Luther King, Jr. Boulevard in Sacramento with his friend, Michael Jordan. As they were walking, Dorrate[1] saw four men standing around a street corner talking. Dorrate suggested turning back, but Jordan kept going, and Dorrate stayed with him. As they passed the men, Jordan stopped, shook someone's hand, and asked where Ricky was. Dorrate kept walking. One of the men told Jordan they did not know where Ricky was but they would let Jordan know if they saw him. Jordan then caught up with Dorrate.

As they continued walking, one of the men (later identified as Diaz) asked, "[W]here you all from?" Dorrate took this as a "kind of . . . threatening question," meaning "what gang do you belong to?" Jordan responded, "I'm from L.A. but I don't gang bang." Diaz said something like, "[A]re you all from L.A? You all got to get [the fuck] up out of here. You all don't belong here." He also said something like, "Oak Park all mines," which Dorrate understood to mean it was their territory. Dorrate told the men they were leaving. Diaz told Dorrate, "Shut up, bitch or I'll slap you."

Dorrate (followed by Jordan) walked quickly to Christian Brothers High School, where there was more light, to call his brother Tykeymo Harrison to come get him because he did not want

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[1] We refer to Dorrate Hicks and his brother Dorral Hicks (who comes into the story later) by their first names to avoid confusion.

to walk home. Dorrate told Harrison about the incident with the four men. Harrison said he would come.

Harrison picked up Dorrate at the school next to Christian Brothers in an Oldsmobile. (Jordan had left already.) Harrison was driving, and with him in the car were their brother, Dorral; Dorral's best friend, Anthony Watson; and Harrison's friend, Javan Gaut. Harrison told Dorrate to tell him where the men were because he wanted to know why they were messing with Dorrate.

About 15 minutes after Dorrate had first encountered the men, he and the others in the Oldsmobile arrived back at the corner. The men were still there. They all got out of the car, which Harrison left running, and Diaz came into the middle of the street, as did Harrison, Watson, and Gaut. Harrison said something like, "my brother just told me one [of you] all from down here was messing with him," and Diaz turned and said something to two of the other men. In response, they walked from one corner to another and around the back of a house. Dorral and Harrison heard Diaz tell one of the other men something like, "go get a gun" or "go get the gun." Diaz then turned back and said Dorrate was not supposed to be there, "This is Oak Park Bloods. We don't know who your brother is."

At that time, Dorral recognized Diaz as someone he had seen before at a jewelry store. Dorral told Diaz he knew him, Diaz responded that he knew Dorral too, they shook hands, and Diaz said, "[E]verything cool."

Dorrate then saw the two men coming back. Gaut told the others that "they was on point and let's get up out of here." Dorrate understood "on point" to mean the men had a weapon. The two men were walking toward the car; the one in the lead was later identified as Broadbent. Dorrate was the first one to get back in the car, then Gaut, followed by Harrison. Before Dorral and Watson got back in, Dorral looked at Broadbent and told him everything was cool and they were leaving. Dorral then got back in the car, and as Watson was getting in, Broadbent started shooting from just a few feet away. The windows on the passenger side shattered, and Watson was hit in the head. Dorrate thought there were about six gunshots; Dorral thought probably eight. Only after the shooting stopped was Harrison able to drive away.

Dorral was shot twice -- one bullet hit him in the upper right arm and traveled through his arm and chest, stopping in his neck; the other bullet struck his left wrist. Harrison was shot in the shoulder. Watson was shot twice -- one bullet hit his left hand, but the other hit him in the head, leaving him in a vegetative state.

After the shooting, a police crime scene investigator examined the car at the hospital and saw bullet holes in the right rear passenger door and a bullet hole in the lower left front windshield.

Diaz and Broadbent were charged in a consolidated complaint with three counts of attempted murder -- one count each for Watson, Dorral, and Harrison. The complaint included various

enhancement allegations, including criminal street gang enhancements on each charge.

At trial, Sacramento Police Detective Wendy Brown testified she was working in the gang suppression unit in January 2006 and was the officer who arrested Broadbent. She was also present at Diaz's arrest two days later. When he was arrested, Diaz had rock cocaine in a plastic baggie.

Detective Brown also testified as the prosecution's gang expert. She testified that Ridezilla (also known as Zilla, Underworld Zilla (U.Z.), and Clap City) is a neighborhood-based gang that is made up primarily of members of the Oak Park Bloods, along with members recruited from other neighboring gangs. Ridezilla is a "very, very violent gang" and its primary activities are "[h]omicides, attempt[ed] homicides, narcotics dealings, [and] assaults with deadly weapons." "The rivals of Ridezilla are anyone who challenges Ridezilla." Ridezilla members "are very, very often armed, and they are not afraid to use them." Diaz and Broadbent were first validated as members of Ridezilla in 2005, based in part on their own admissions of gang membership. Detective Brown expressed her opinion that the shooting was committed for the benefit of Ridezilla because "the gang . . . benefits by a show of force in answering disrespect."

The jury found both defendants guilty of all three charges and found true all of the enhancement allegations. The trial court sentenced Broadbent to an aggregate term of 35 years plus 50 years to life in prison. The court sentenced Diaz to an

aggregate term of 18 years 4 months plus 50 years to life in prison.

DISCUSSION

I

Public Trial

Broadbent contends his "constitutional right to a public trial was violated when the court excluded his father and brother from the audience without a finding that would support an 'overriding interest' or even a 'substantial basis' to justify the infringement upon his right to a public trial." We conclude Broadbent forfeited this argument by not raising it in the trial court, and we also reject his alternate argument that his trial attorney was ineffective for failing to make this argument in the trial court.

On the day of opening statements, as the court and counsel were addressing a supplemental motion in limine outside the presence of the jury, the prosecutor notified the court that Broadbent's father and brother, who were in the hall outside the courtroom, were wearing T-shirts that displayed some sort of message about freeing Broadbent. Broadbent's attorney left the courtroom and told them to leave and come back wearing something else. Counsel noted there were jurors in the hallway who saw the shirts. Accordingly, before opening statements began, the court reminded the jury not to be influenced by anything outside the courtroom, including "if you see anyone . . . wearing some clothing that might appear to be inappropriate."

The next morning, after Dorrate finished testifying, one of the jurors reported to the court that he had been in a stall in the bathroom when he heard two individuals discussing Dorrate's testimony. The juror identified one of the individuals as Broadbent's brother. (It was his identical twin.) The description of the other individual the juror provided matched Broadbent's father.

Immediately thereafter, one of the other jurors and one of the alternate jurors reported to the court that a member of the audience had tried to make small talk with them in the hallway. Their description of that person matched Broadbent's father.

Diaz's attorney requested a separate trial based on the actions of Broadbent's father and brother. Broadbent's attorney asked that the juror who overheard the conversation in the bathroom be excused. The prosecutor opposed both requests but asserted that the court "ha[d] enough to dismiss [Broadbent's father and brother] right now so they don't come back at 1:30." The court asked if the matter was submitted, and all three counsel agreed it was.

The trial court denied the defense requests but found that Broadbent's father and brother had "made attempts to influence this jury. And I'm going to have them excused from this courtroom." After excusing the jury for lunch, the court informed Broadbent's father and brother that they were "banned from this courtroom during this pending trial" based on the shirt incident and the two conversations.

At no time did Broadbent's attorney object to or argue against the exclusion of Broadbent's father and brother from the trial.

The initial question we face is whether Broadbent's argument that the exclusion of his father and brother violated his right to a public trial is properly before us. Broadbent acknowledges that he did not make this argument in the trial court, but he offers three different reasons why "[t]his constitutional claim is reviewable despite lack of objection below."

One, Broadbent contends that "the right to jury trial cannot be forfeited by silence, but can only be waived by an express waiver from the defendant personally, and the right to a public trial is an integral component of the jury trial right." He thereby implies that the right to a public trial -- here, the right to have his father and brother present at the trial -- cannot be forfeited by silence but must be expressly waived. Our Supreme Court has repeatedly held otherwise. (See, e.g., *People v. Bradford* (1997) 14 Cal.4th 1005, 1046-1047 ["a failure to object constitutes a waiver of the right to a public trial" and "[n]o . . . personal waiver is expressly required to waive the right to a public criminal trial"]; *People v. Catlin* (2001) 26 Cal.4th 81, 161 ["Failure to object [to closed proceedings] constitutes a waiver of the claim on appeal"].) Thus, this argument fails.

Two, Broadbent contends that his "failure to object is excused by the fact that there was no meaningful opportunity to

object before the court ruled and an after-the-fact objection would have been futile." He is wrong. When the prosecutor asserted "the Court has enough to dismiss [Broadbent's father and brother] right now so they don't come back," the trial court said, "All right. Matter submitted?" At that time, Broadbent could have objected but he did not; instead, he agreed to submit the matter.

Three, Broadbent asserts his public trial argument is actually "a claim challenging the sufficiency of the evidence to support the closure order" and "[c]laims of insufficient evidence are not waived by failing to object." It is true that the rule allowing a claim of insufficiency of the evidence to be raised for the first time on appeal is not limited to judgments. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1126 [challenge to an order for HIV testing].) As we have noted, however, our Supreme Court has repeatedly held that the right to a public trial can be forfeited by failure to object in the trial court, and we do not believe this principle can be avoided simply by recasting the issue as one involving the sufficiency of the evidence to support the trial court's action.

"'"No procedural principle is more familiar . . . than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."'" (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) "'"'In the hurry of the trial many things may be, and are, overlooked which would readily have been

rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'"'" (*Ibid.*)

Had Broadbent objected in the trial court to the exclusion of his father and brother on the ground it violated his constitutional right to a public trial, the trial court would have been alerted to the necessity of determining to what extent its exclusion order intruded on Broadbent's rights and whether exclusion was appropriate under the facts before it and the governing case law. Having failed to alert the trial court of the need for this determination, Broadbent cannot raise this issue for the first time on appeal as a basis for upsetting the result of the trial that followed. Under well-established Supreme Court precedent, he forfeited this argument by failing to raise it in the trial court.[2]

In the alternative, Broadbent argues "the issue can be reviewed as ineffective assistance of counsel" because his trial attorney's failure to object to the exclusion of his father and brother cannot have been "'sound trial strategy.'" To prevail

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[2] For these same reasons, we reject Broadbent's assertion that "this case is an appropriate candidate for discretionary review" of his forfeited claim of error.

on such a claim, however, Broadbent must show that his attorney's actions fell below an objective standard of reasonableness, and "normally a claim of ineffective assistance of counsel is appropriately raised in a petition for writ of habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal, such as counsel's reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform" the inquiry into the reasonableness of counsel's action. (*People v. Snow* (2003) 30 Cal.4th 43, 111.) "In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

Here, we cannot say from the record before us that there could be no conceivable reason for Broadbent's trial attorney to allow Broadbent's father and brother to be excluded from the trial without objection. Counsel could have feared that continued inappropriate conduct by the two men would reflect badly on Broadbent in the jury's eyes. Or perhaps he feared the jury would be distracted from its task by further disruptions they might cause. Whether Broadbent's attorney acted reasonably in not objecting to the exclusion of Broadbent's father and brother is simply not something we can determine on the record before us. Accordingly, Broadbent's claim of ineffective assistance of counsel fails.

II

Evidentiary Issues

A

Predicate Offenses

Broadbent offers several arguments on appeal relating to the predicate offenses on which the prosecution relied to qualify Ridezilla as a criminal street gang within the meaning of Penal Code[3] section 186.22. We address those arguments in turn.

1. *Sufficiency Of The Evidence*

Broadbent contends the evidence was insufficient to prove the predicate offenses because the only evidence of the offenses was hearsay testimony offered by Detective Brown, which the trial court had already ruled would not be admitted for the truth of the matters asserted. We disagree.

Under subdivision (b)(1) of section 186.22, a person "who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" is subject to an additional term of imprisonment. For purposes of this sentence enhancement provision, a "criminal street gang" is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary

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[3] All further section references are to the Penal Code unless otherwise indicated.

activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [certain enumerated] offenses . . . ." (*Id.*, subd. (e).) These offenses are commonly referred to as "predicate offenses." (See *People v. Zermeno* (1999) 21 Cal.4th 927, 931.)

"It is incumbent upon the prosecution in seeking an enhancement under section 186.22, subdivision (b), to prove through competent evidence the elements of a 'criminal street gang' as set out in the statute, including the offenses necessary to satisfy the pattern requirement." (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1004.)

With this understanding of the predicate offense requirement, we turn to the procedural background of Broadbent's argument.

Before trial, Diaz filed a written motion in limine to limit the testimony of the prosecution's gang expert. Among other things, Diaz asserted "[t]he gang expert should not be allowed to comment on hearsay statements about [Diaz]'s association with Ridezilla." He also asserted that the expert's

opinion about the primary activity of Ridezilla was inadmissible "because it is hearsay and lacks foundation." Diaz did not assert a hearsay objection to any potential testimony regarding the predicate offenses to be used to establish a pattern of criminal activity by Ridezilla. Instead, Diaz argued only that "[t]his element must be established by 'substantial evidence.'"

In addressing Diaz's motion in limine, the court and counsel first addressed Diaz's assertion that the gang expert "should not be allowed to testify to [Diaz]'s state of mind or give an opinion that [he] had the intent to promote or assist the gang because that is an impermissible encroachment upon the jury's exclusive function." Diaz's attorney conceded she did not think the prosecutor "would try to elicit an opinion on an ultimate fact from a gang expert," but she argued "that having an expert testify Mr. Diaz is -- is a validated gang member, this is what his gang does, this particular crime was gang related, is tantamount to the same thing." In discussing this argument, the court observed generally that "the facts [to] which the [gang expert] testifies in formulating that opinion are not being offered for the truth of the matter asserted. They're being offered to show the basis on which the expert is relying." Ultimately, the court ruled the gang expert would "be allowed to give an opinion as to whether or not these defendants in this particular instance acted for the benefit of, and association with or at the direction of a criminal street gang."

Later, in discussing Diaz's assertion that the gang expert should not be allowed to comment on hearsay statements about

Diaz's association with Ridezilla, Broadbent's attorney argued that if the court allowed such testimony, it should "admonish the jury that they're not to take any of it as proof of the truth of the matter." The court ruled that such testimony would be allowed because "[t]he case law makes clear that experts can rely on hearsay statements . . . in formulating their opinion."

During these pretrial discussions of Diaz's motion in limine, there was no discussion about any potential testimony regarding the predicate offenses to be used to establish a pattern of criminal activity.

At the end of the prosecutor's voir dire of Detective Brown to establish her as a gang expert, Diaz's attorney reiterated her objection to any opinion testimony based on hearsay. When the court pointed out that "the case law recognize[s] that [hearsay] is the type of evidence that experts normally rely upon" and the evidence is admissible because "it's being offered to show the -- expert's opinion and basis of that opinion," Diaz's attorney asked if the court would "consider giving an admonition to the jury." The court noted that it had, in some cases, instructed the jury on the use of hearsay evidence "consistent with the CALCRIM" "prior to the proffered testimony," and in some cases the attorneys had "fashion[ed] instructions that essentially allow the jurors to focus on the evidence that is -- is subject to the expert's opinion." The court then observed that in some cases the expert may testify to "things [that] relate to the nature of the offense," and the court specifically observed that "Detective Brown was also an

investigating officer in this case so that it -- she testifies to it as a per[cipi]ent witness." The court explained that sometimes the attorneys fashioned custom instructions "pinpoint[ing] what evidence they're referring to" because some evidence may be admitted for multiple purposes.

Diaz's attorney declined to prepare such an instruction and instead asked the court to "just read the general instruction." Subsequently, before Detective Brown resumed testifying, the court instructed the jury with CALCRIM No. 1403 on the limited use of evidence of gang activity. This instruction did not address the use of hearsay evidence.[4]

Thereafter, in the course of her testimony, Detective Brown testified without objection to two predicate offenses involving Ridezilla members. First, she testified about an incident in which a female member of the Oak Park Bloods got into an altercation with a member of a rival Crips gang during which she

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[4] As given here, the limiting instruction was as follows: "Now, relative to, um, gang activity, you may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose and knowledge that are required to prove the gang related crimes and enhancements. [¶] Or the defendant had the motive to commit the crimes. [¶] Or the defendants actually believed in the need to defend themselves. [¶] Or the defendants acted in the heat of passion. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness. [¶] And when you consider the facts and information rel[i]ed on by an expert witness in reaching her opinion[. Y]ou may not consider this evidence for any other purpose. [¶] You may not conclude from this evidence that the defendants are persons of bad character or that they had a disposition to commit the crimes."

shot the rival gang member "because the Ridezilla gang members told her to do so." Second, she testified about an incident in which eight Ridezilla members shot up a house, and one of the gang members (David Perkins) was struck and killed by a bullet fired by one of his fellow gang members.[5] She testified that she personally worked on both cases and that she was involved in interviewing the female gang member involved in the first incident.

In instructing the jury at the end of the case, the court gave CALCRIM No. 1403 (the limited use of evidence of gang activity) again. The court also gave CALCRIM No. 360, which told the jury, "Wendy Brown testified that in reaching her conclusions as an expert witness she considered statements made by others. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true."

We now turn back to Broadbent's argument. He contends the prosecutor "failed to present any competent evidence to establish" the two predicate offenses because "[n]o percipient witness to either crime testified." Instead, the prosecutor "relied solely on the testimony of the gang expert," but "[b]ecause she was not a percipient witness to either offense, [her] testimony as to the facts of each incident was necessarily hearsay." "The jury was specifically instructed that hearsay

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[5] We will refer to this as the Perkins incident or shooting.

testimony given by the expert . . . *cannot* be considered for the truth of the matter asserted." Because "[j]urors are presumed to follow limiting instructions," Detective Brown's "hearsay accounts of how the predicate offenses occurred cannot supply substantial evidence" of the commission of those offenses.

Broadbent's argument fails for one simple reason: Detective Brown's testimony about the predicate offenses did not fall within the limiting provisions of CALCRIM No. 360. By its terms, that instruction applied only to "statements made by others" that Detective Brown testified she considered "in reaching her conclusions as an expert witness." Thus, for example, to the extent Detective Brown considered statements made by others in reaching her opinion that the attempted murders of Harrison, Watson, and Dorral were committed for the benefit of a criminal street gang, CALCRIM No. 360 told the jurors they were "not [to] consider those statements as proof that the information contained in the statements is true." But in testifying to the occurrence of the two predicate offenses, Detective Brown was not expressing any opinion or conclusion she reached as an expert witness. Rather, she was testifying to facts she became aware of as an investigating officer of both the predicate crimes. True, even as an investigating officer she may not have had personal knowledge of the facts of the incidents and may have come by her knowledge of those facts only

through statements made by others,[6] but this only made her testimony regarding the predicate offenses subject to a hearsay/lack of personal knowledge objection that defendants never made; it did not make her testimony regarding those offenses subject to the limiting effects of CALCRIM No. 360, which applied only to her testimony as an expert witness.[7]

Because the limiting instruction did not apply to Detective Brown's testimony about the predicate offenses, that testimony could and did constitute substantial evidence of those offenses, and Broadbent's argument to the contrary is without merit.

2. *Crawford*

Broadbent contends Detective Brown's hearsay testimony regarding the predicate offenses violated his Sixth Amendment right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177]. In *Crawford*, "the high court held that the confrontation clause of the Sixth Amendment to the federal Constitution prohibits 'admission of *testimonial*

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[6] This is particularly apparent with regard to the first incident, as Detective Brown's testimony clearly implied she learned the details of the incident by interviewing the perpetrator. Although it is not as clear from whom Detective Brown learned the details of the second incident, it appears she must have learned those details from one or more of the persons or other source of information she encountered while investigating the incident.

[7] To the extent Broadbent purports to rely on the limiting effects of CALCRIM No. 1403 to support his argument, that reliance is misplaced because, as we have observed already, that instruction does not address the use of hearsay evidence; it addresses the use of gang activity evidence.

statements of . . . witness[es] who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" (*People v. Romero* (2008) 44 Cal.4th 386, 421.)

We reject Broadbent's *Crawford* argument at the outset because neither defendant objected to Detective Brown's testimony regarding the predicate offenses on this ground (or *any* ground, for that matter) in the trial court. (See *People v. Morris* (2008) 166 Cal.App.4th 363, 367 [*Crawford* objection not raised below is not preserved for appeal].)

As we have noted, before trial, Diaz moved in limine to limit the testimony of the prosecution's gang expert. One of the limits Diaz requested was to prohibit the expert from "comment[ing] on hearsay statements about [Diaz]'s association with Ridezilla." When this aspect of Diaz's motion came up for discussion, his attorney argued that "allowing that kind of hearsay evidence . . . [¶] violates [his] Sixth Amendment right to a fair trial and to confront the witnesses against him." The court rejected that argument, implicitly concluding that hearsay statements on which an expert relies to formulate an opinion are not subject to *Crawford* because the jury is instructed that such statements are not to be considered for the truth of the matter asserted.

Obviously, Diaz's *Crawford* objection relating to hearsay statements about his association with Ridezilla had nothing to do with any testimony Detective Brown might offer regarding the predicate offenses necessary to establish a pattern of criminal

activity. Moreover, at no time either before or during Detective Brown's testimony about the predicate offenses did either Diaz or Broadbent assert a *Crawford* objection -- or any other objection for that matter -- to that testimony. In the absence of such an objection, the issue is forfeited.

3. *Nonresponsive Answers*

During the discussion of in limine motions, Diaz's attorney told the court that the prosecutor might use the Perkins incident as one of the predicate offenses to establish a pattern of criminal activity by Ridezilla, and she had "intended to make" a motion under Evidence Code section 352 to exclude any "identification of either defendant as having been there," but the prosecutor had told her she did "not intend to introduce evidence to the extent she has it -- that Mr. Diaz was present at the Perkins incident," so Diaz's attorney was "satisfied about that." The prosecutor confirmed she was "not going to be getting into the fact that Mr. Diaz and Mr. Broadbent were named as two of the shooters within the -- the eight or nine people [who] were out on the street on the day that David Perkins died" or "the fact that -- that Mr. Diaz was implicated by his co-defendant in that particular shooting."

During his cross-examination of Detective Brown, Broadbent's attorney asked her certain hypothetical questions about whether U.S.C. (University of Southern California) alumni could be considered a criminal street gang. Later, during recross-examination, Broadbent's attorney questioned her about the use of the Perkins shooting to establish that Ridezilla is a

criminal street gang. He then returned to his "hypothetical about U.S.C. alumni" being "a criminal street gang" and asked her if she thought that was "ridiculous." Detective Brown responded, "The ridiculous part about it is that . . . we've already established the fact that they are not a criminal street gang. [¶] If you want to tell us about the crimes that they've committed, that's fine, but it doesn't make them a street gang." The following exchange then occurred:

"Q Well, when you testified to these two incidents that members of the oak or the Ridezilla group committed, the purpose of that was to show that because these crimes were committed by other members it follows, therefore, that Ridezilla is a criminal street gang. In other words, the purpose is defined by the conduct of its members.

"A Yes. The purpose is defined by the conduct of its members, and its members are the people who committed these acts, *including your client*.

"Q Well, to establish a predicate offense under this law you don't have to establish that the people who are on trial in a given case had anything to do with those crimes; do you?

"A You don't have to, *but in this circumstances it is the case*.

"Q Okay. But you don't have to?" (Italics added.)

At this point, Diaz's attorney asked to approach, but instead Broadbent's attorney withdrew the question. Shortly thereafter, Broadbent's attorney concluded his examination, and

the prosecutor said she was "going to need to approach the bench."

Outside the presence of the jury, the prosecutor argued that the questions by Broadbent's attorney had "opened" "the door" "for a thorough answer[that] would reveal that Mr. Broadbent according to this expert's opinion was involved in the . . . Perkins shootout." Broadbent's attorney asserted that he intended "to establish the parameters of the law, particularly the parameters of the predicate offenses, and not to assert the innocence of Mr. Broadbent regarding the particular incident." The prosecutor argued that "asking the question the way it was asked, both questions, particularly the last question, which is a follow-up of the first question, suggests and places at least his client in a false light given what he knows." Broadbent's attorney ultimately said, "Frankly, I think it was nonresponsive, and I would move to strike it, but whether it stays or doesn't stay, that's -- I think that should be the end of it." The court concluded that "the question could have been interpreted in more than one way, and the manner in which Detective Brown interpreted the question was actually the appropriate way to address it, . . . and . . . the question and answer [are] going to stand." Diaz's attorney requested that "the last question and answer be stricken from the record" because Detective Brown's answer to that question implicated Diaz. In response, the prosecutor continued to assert that she should be allowed "to get into the prior gang crimes of Mr. Broadbent," and she asserted that by doing so "it would

clean up" the implication relating to Diaz. The court concluded the prosecutor did not "need to do that" and the answer did not need to be stricken either "because . . . the answer that was given is the correct statement of the law." The court later reiterated its belief that Detective Brown's responses "were totally correct" and "what occurred was exactly what should have occurred." The court decided "to leave the question and answer as is" because "[w]e know at least there is some evidence that [Detective Brown was] speaking truthfully based on the question that was posed, that it wasn't true in this case, because arguably the defendants do have some involvement in at least one of the predicate offenses."

On appeal, Broadbent contends the portions of Detective Brown's answers in which she tied Broadbent to the predicate offenses (italicized above) should have been stricken as nonresponsive. (See *People v. Bell* (2007) 40 Cal.4th 582, 611, fn. 11 ["A nonresponsive answer is properly the subject of a motion to strike"].)

The People assert there was no error because "Broadbent's defense counsel did not unequivocally request that Detective Brown's answers be stricken." We disagree. Broadbent's attorney asserted the answer was "nonresponsive" and he "would move to strike it," and the trial court plainly understood this was a motion to strike because the court expressly ruled that "the question and answer [are] going to stand," thereby denying the motion. Furthermore, Diaz's attorney thereafter made an unequivocal motion to strike, which the trial court also denied.

In the absence of any argument by the People that Detective Brown's answers were responsive to the questions from Broadbent's attorney, we agree with Broadbent that the trial court should have stricken the nonresponsive portions of those answers. Detective Brown's assertion in response to the first question that Broadbent ("your client") was one of "the people who committed these acts" was not responsive to anything in the question, but was a gratuitous addition. Detective Brown may have believed Broadbent's attorney was attempting to insinuate by his question that Broadbent was not involved in the Perkins incident and may have wanted to counter that insinuation, but it was not her place to do so, particularly when the prosecutor had advised her "that she should present the predicate [offense] in a clean manner omitting reference that [defendants] were . . . two of the . . . six shooters out in the street in addition to Mr. Perkins." The same conclusion applies to the second question. While Detective Brown may have felt Broadbent's attorney was trying to insinuate that Broadbent was not involved in the Perkins incident, his question asked only for her to identify what is required generally to establish a predicate offense, and her additional statement, "but in this circumstance it is the case," was nonresponsive to that question.[8]

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[8] Because we conclude the nonresponsive portions of Detective Brown's answers should have been stricken as nonresponsive, we need not consider Broadbent's additional argument that those answers amounted to prosecutorial misconduct under state law because they violated the trial court's in limine ruling.

Broadbent contends he was prejudiced by the trial court's failure to strike the nonresponsive portions of Detective Brown's answers because "the evidence against [him] was weak in terms of eyewitness identification and provocation" and "[t]he predicate offenses were inflammatory and prejudicial." To establish prejudice, Broadbent must persuade us there was a reasonable probability he would have obtained a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) He has not done so. First, we do not share Broadbent's assessment of the evidence against him as "weak." Second, no matter how close the case may have been, we do not find a reasonable probability that the isolated responses from Detective Brown suggesting Broadbent was involved in at least one of the predicate offenses made a difference to the jury's resolution of the charges against him. Stated another way, Broadbent has given us no reason to believe it is reasonably probable that in a 10-day trial, these two brief statements were material to the jury's decision. Accordingly, we conclude the trial court's error in failing to strike the nonresponsive answers was harmless.

B

Baggie And Playing Die

In the midst of trial, before the prosecution called a crime scene investigator as a witness, Diaz's attorney moved to preclude the witness from testifying about a plastic baggie, tied in a knot and with a hole in it, that was found at the scene of the shooting, on the corner where Diaz and others had

been standing. She argued the evidence of the baggy was "irrelevant" and "potentially highly prejudicial" because Diaz was not charged with possession of drugs and there was no evidence he "was in possession of this bagg[ie]." Broadbent's attorney joined in the motion.

The prosecutor explained that the baggie was seized by investigators "along with a blue die" (one half of a pair of dice) because that corner was known for drug dealing. In arguing the relevance of the evidence, the prosecutor asserted that "law abiding Sacramento residents, tax paying, working citizens who end [up] on jury duty are hard-pressed to understand why people mill around on the street corner on January 13th and there is a handgun across the street. [¶] And what's going to come out with a gang expert [is] that that is pretty part and parcel with what she sees on a regular basis. . . . [¶] . . . [¶] And I mean, there's just no getting around it. They're -- they're peddling dope on a corner and they're gang members."

The court concluded it was not "even . . . a close call" under Evidence Code section 352 because the "evidence . . . is certainly more probative than prejudicial."

Thereafter, the crime scene investigator identified the baggie and die that were found on the corner. After Detective Brown later testified that the corner was "a known narcotics dealing location" where "gang members deal dope" -- primarily rock cocaine and marijuana -- the prosecutor elicited her testimony that rock cocaine is typically sold in baggies. The

prosecutor then expanded on an earlier hypothetical question and asked if the presence of the baggie and die found at the scene would "strength[en Detective Brown's] opinion that narcotics transacting [wa]s taking place on the corner?" Detective Brown said it would because "rock cocaine is packaged and sold very oftentimes located in the bagg[ie]," and "the only reason that the die would have any type of significance is you see that oftentimes, and not only when people are selling drugs, but a lot of times when people are out on the corner selling drugs they'll just roll dice just to pass the time. They'll gamble a little bit." Detective Brown later expressed her opinion that if a person who was not there to buy drugs walked through a "dope selling corner," the Ridezilla gang members selling the drugs would approach or intimidate that person. She also expressed her opinion that there would be "some sort of confrontation" if "a car rolls up and there's five people inside and . . . four occupants jump out of the car" and "walk toward one of the [Ridezilla] gang members yelling relatively aggressive words."

On appeal, Broadbent contends the trial court erred in admitting evidence of the plastic baggie and the die because the evidence was irrelevant and more prejudicial than probative. We find no error.

First, with respect to the die, there was no objection to its admission. Broadbent notes in his opening brief that "counsel for Diaz made a motion . . . to exclude evidence of a baggie," but he notes no such motion or objection relating to

the die -- because there was none. The failure to object to the die in the trial court precludes us from considering on appeal whether it was error to admit that evidence. (See Evid. Code, § 353, subd. (a) ["A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"].)

That leaves the plastic baggie. Broadbent asserts evidence of the baggie was irrelevant because "[i]t was nothing more than a piece of litter in the street." Then, somewhat inconsistently, he asserts the evidence was more prejudicial than probative because it was "[e]vidence of narcotic involvement" "to support a speculative theory that defendants were engaged in gang-related narcotic sales at the time of the shooting." We disagree on both points.

"Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact . . . .' [Citation.] The trial court is vested with wide discretion in determining the relevance of evidence." (*People v. Babbitt* (1988) 45 Cal.3d 660, 681, quoting Evid. Code, § 210.) Here, the trial court did not abuse its discretion in determining that evidence of the plastic baggie had some tendency in reason to prove a disputed fact in the case -- specifically, whether Broadbent attempted to murder Harrison, Watson, and Dorral and

whether Diaz aided and abetted him in the commission of those crimes.

In closing argument, the prosecutor explained her theory of the attempted murder as follows: "validated gang members were out conducting illegal transactions on a street corner in Oak Park, . . . a gun was nearby, . . . both defendants, . . . both validated U.Z. gang members, knew about the gun, knew it was loaded, . . . two young men walked through that neighborhood and were punked out, intimidated, bullied and . . . their older brothers came back, jumped out of a car aggressively, . . . and then the U.Z. gang members attempted to kill five people."

Evidence tending to show that Broadbent, Diaz, and their companions were hanging out on the street corner to sell drugs -- specifically, rock cocaine, which is commonly sold in plastic baggies like the one found at the scene -- was integral to the prosecution's theory that they were acting to protect their "turf" when Diaz told Broadbent to go get a gun, and Broadbent did so and then shot the victims with it. As the trial court put it, the evidence of drug dealing was "probative of whether or not U.Z. or Ridezilla tried to hold down that corner for want of a better term." The plastic baggie was consistent with the other evidence of drug dealing and reasonably served as part of the basis for Detective Brown's opinion that drug dealing was occurring on that corner the night of the shooting. It is true the baggie was not *conclusively* proved to be "related to illegal drug use" (as Broadbent argues), but the test for relevance does not require such proof. All that was necessary was that the

baggie have *some* tendency in reason to prove drug dealing was occurring. It did, and therefore the trial court did not abuse its discretion in determining the evidence of the baggie was relevant.

The trial court also did not abuse its discretion in determining the evidence of the baggie was more probative than prejudicial under Evidence Code section 352.[9] First, we have already rejected Broadbent's assertion that "the evidence was utterly devoid of probative value." Second, the only prejudice Broadbent associates with the evidence is that it was "[e]vidence of narcotic involvement," but as we have explained, that is exactly what made the baggie relevant in the first place. "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.) Here, the baggie was not the sort of evidence that would uniquely tend to evoke an emotional bias against defendants with very little effect on the issues. Rather, it was simply damaging because it tended to support the other evidence that defendants were involved in drug dealing on the corner that night and shot the victims to protect their

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[9] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." (Evid. Code, § 352.)

"turf." Consequently, the trial court did not abuse its discretion in admitting evidence of the baggie.

C

Gang Validation Testimony

In his pretrial motion to limit the testimony of the prosecution's gang expert, Diaz identified four numbered areas in which he wanted the court "to place reasonable and appropriate limits on the gang expert's testimony." He then stated that "[f]urther bases for such requests are set forth below," which was followed by 20 pages of argument. Amidst those 20 pages, under the fourth of six headings, Diaz argued that "[t]he opinions of gang experts are inadmissible because they constitute improper profile evidence," and he asked the court to "limit the gang expert's opinions and testimony so that profile evidence is not proffered to the jury."

In addressing Diaz's motion, the trial court covered the four numbered areas identified at the beginning of the motion and nothing else. At no time did either Diaz or Broadbent address the "profile" argument buried in Diaz's in limine motion or secure a ruling from the trial court on that argument.

Thereafter, Detective Brown testified without objection about how Broadbent and Diaz were "validated" by law enforcement as members of Ridezilla pursuant to a list of 10 criteria

developed by the Department of Justice and adopted by the Sacramento Police Department.[10]

On appeal, Broadbent contends Detective Brown's gang validation testimony was inadmissible profile evidence. There are multiple problems with this argument. First, no one made it in the trial court. Although, as we have noted, Diaz buried in his motion in limine an argument that "[t]he opinions of gang experts are inadmissible because they constitute improper profile evidence," that argument did not specifically tie the claim of "profiling" to the issue of gang "validation." Thus, while Diaz asked the court to prohibit the gang expert from offering profile evidence, Diaz never argued that the evidence of gang validation *was* profile evidence. Accordingly, we cannot reach this argument on appeal. (See Evid. Code, § 353, subd. (a).)

Second, even if we were to assume Diaz's buried argument about inadmissible profile evidence could have been understood as relating to evidence of gang validation, neither Diaz nor Broadbent secured a ruling from the trial court on that

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[10] Detective Brown testified that "[t]he 10 criteria are a person admits their membership in the gang, is tattooed with a gang logo, is in the company of other validated gang members, has been involved in gang related crimes, is named by two or more members of their gang as a member of that gang, a photograph which indicates and shows gang membership, county or jail correspondence that indicates the gang membership, has been contacted in the field participating in gang related crimes by law enforcement, has gang graffiti, and the individual has been contacted wearing gang clothing."

argument. In his opening brief, Broadbent tries to suggest the court ruled on the argument when it "ruled that the gang expert would be able to give gang validation evidence." The part of the transcript Broadbent cites, however, involved the trial court's ruling on two of the four numbered areas in which Diaz specifically asked the court to limit the gang expert's testimony, namely, his requests to prohibit testimony: (1) "to whether the defendant actively participated in Ridezilla or any other named alleged gang because that is unfounded, speculation and another impermissible encroachment upon the jurors exclusive function," and (2) "to what the primary activities of Ridezilla members are because the expert has insufficient knowledge upon which to base an opinion." The court's ruling on these arguments did not include a ruling on the buried argument that the expert should be prohibited from offering inadmissible profile evidence.

"A properly directed motion *in limine* may satisfy the requirements of Evidence Code section 353 and preserve objections for appeal. [Citation.] However, the proponent must secure an express ruling from the court." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) That did not happen here.

Finally, even if this argument were properly before us, we would reject it because Detective Brown's gang validation testimony was not improper profile evidence. "A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime," and "[p]rofile evidence is generally inadmissible to prove guilt" because it is

"'inherently prejudicial'" due to "'the potential of including innocent people as well as the guilty'" within the profile. (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084-1085.) Thus, in *Robbie* the appellate court concluded the trial court erred in admitting expert opinion testimony offered to prove the defendant's conduct was consistent with being a rapist. (*Id.* at pp. 1077, 1081.)

Detective Brown's testimony that Diaz and Broadbent satisfied a number of the criteria law enforcement use to "validate" gang members was in no way similar to evidence of a criminal profile, i.e., that by their conduct they met the profile of attempted murderers. Accordingly, even if defendants had objected to the gang validation evidence on this basis, the trial court would not have erred in admitting the evidence over their objection.

III

Bifurcation

Before trial, Broadbent moved to bifurcate trial on the criminal street gang enhancement allegations; Diaz joined in that motion. Broadbent's attorney argued generally that a gang enhancement allegation is "used to tell a jury that somebody is . . . an evil gangster" and "the way to at least mitigate some of that prejudice would be to have the guilt of the underlying offense determined separately by a jury . . . [un]contaminated with the gang evidence." Diaz's attorney added that "allegations of gang involvement are highly prejudicial" and "it's almost impossible to get a fair trial in a gang case if

there is not bifurcation." Neither attorney offered any specific argument related to the facts of this case.

In response, the prosecutor argued that "[t]his particular case involves such a gang intent and motivation that the Court would be hard-pressed to start slicing up what should or should not come before this jury. [¶] Everything that's said out there on the street . . . involves gang motivation and a benefit for their gang in the form of intimidation . . . ." "This case is full with evidence of the intent behind these two defendants' acts. And it is all based on a gang intent and a gang claim. [¶] . . . [T]here is just no way that we could equitably for the prosecution slice up what this jury should hear because it's all part and parcel, and it's all so finely woven into what was taking place in the minds of the defendants, which is what the jury has a right to hear given the charges against them."

The court concluded "this case is a classic case where the Court will be disinclined to bifurcate the gang enhancement" because "this is a classic case where the gang evidence is certainly relevant to the crime itself." The court explained that "the gang evidence in this case is certainly more probative than prejudicial because it shows the motivation behind the shooting." Accordingly, the court denied the motion.

On appeal, Broadbent contends the trial court abused its discretion in denying the motion to bifurcate and denial of the bifurcation resulted in gross unfairness amounting to a denial of due process. We disagree.

The trial court has broad discretion to deny bifurcation of a charged gang enhancement. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) Broadbent acknowledges that the propriety of the court's ruling must be based on "the record before the trial court at the time of its ruling." (*People v. Catlin* (2001) 26 Cal.4th 81, 110 [motion to sever].) However, in arguing that the "evidence offered to prove [the] gang enhancements was highly inflammatory and prejudicial," he refers to the testimony contained in the preliminary hearing transcript, without ever showing that that transcript was brought to the trial court's attention in connection with the motion to bifurcate.[11] This is inappropriate. We must evaluate the trial court's ruling based on the record the parties -- particularly, defendants -- made in connection with that ruling. Here, defendants made no record. As noted above, they argued for bifurcation only in the most general terms, without reference to the specific facts of this case, whether shown in the transcript of the preliminary hearing or otherwise. Without identifying the record that was actually before the trial court at the time it ruled on the motion to bifurcate, Broadbent cannot show an abuse of discretion in that ruling.

Broadbent's alternate argument is that "[a] motion to bifurcate gang allegations is a form of severance motion," and

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11 The preliminary hearing was held in September 2006 before Judge Raoul M. Thorbourne; the motion to bifurcate was heard in August 2007 by Judge Troy L. Nunley.

"[i]n the context of severance," reversal is required even if the initial denial of the severance motion was correct when made if the defendant shows that joinder "'actually resulted in "gross unfairness," amounting to a denial of due process.'" He contends that such unfairness occurred here because the gang expert "volunteered a non-responsive answer that implicated [him] in both predicate offenses." In his view, "the jury was not only exposed to highly inflammatory evidence which portrayed Ridezilla as an extremely violent gang, whose members have committed predicate offenses of murder and attempted murder, the jury [was] told by the gang expert that [Broadbent] himself was involved in those two predicate offenses."

We have concluded already that the trial court's failure to strike Detective Brown's isolated, nonresponsive answers suggesting Broadbent was involved in at least one of the predicate offenses was harmless. It follows that those answers were not so unfair to defendant, even in combination with the other gang evidence, which was a critical part of the prosecution's overall case, as to amount to a denial of due process.

IV

Jury Instructions

A

Unanimity

Diaz contends the trial court erred in failing to give a unanimity instruction because "[t]he prosecution proceeded on a theory that [he] was an aider and abettor" and "[t]he aiding and

abetting of the offenses could have been premised on any one of two acts under the evidence the prosecution presented." More specifically, Diaz contends the jury could have found he aided and abetted Broadbent either by telling him to "go get the gun" or by "lull[ing] the victims into a false sense of security, or divert[ing] their attention from [Broadbent] while [he] was preparing his deadly assault." We find no error.

In *People v. Jenkins* (2000) 22 Cal.4th 900, the defendant insisted he was entitled to a unanimity instruction because the jury could have found him guilty of murder either as the direct perpetrator or as an aider and abettor. (*Id.* at p. 1024.) The Supreme Court disagreed, noting it was "'settled that as long as each juror is convinced beyond a reasonable doubt that [the] defendant is guilty of murder as that offense is defined by statute, it need not decide . . . unanimously whether [the] defendant was guilty as the aider and abettor or as the direct perpetrator." (*Id.* at pp. 1024-1025.) "[R]el[ying] upon authority indicating that the unanimity instruction is required if there are multiple acts shown that could have been charged as separate offenses," the defendant in *Jenkins* argued that "the circumstances in support of his potential accomplice liability--that he was far from the scene when the murder occurred but had aided and abetted in it--were so distinct from the circumstances in support of his potential direct liability--that he had been at the scene and had pulled the trigger--as to constitute two 'discrete criminal events' requiring the unanimity instruction." (*Id.* at p. 1025.) Still disagreeing, the Supreme Court stated,

"In the present case, defendant's conduct as an aider and abettor or as a direct perpetrator could result only in one criminal act and one charge. Under these circumstances, '[j]urors need not unanimously agree on whether the defendant is an aider and abettor or a principal even when different evidence and facts support each conclusion.'" (*Id.* at pp. 1025-1026.)

Jenkins compels a similar result here. If there is no need for jury unanimity on whether a particular defendant was the perpetrator or an aider and abettor of a murder, then why should there be a need for jury unanimity on whether Diaz aided and abetted the attempted murders of Harrison, Watson, and Dorral by telling Broadbent to "go get a gun" or by lulling the victims into a false sense of security while Broadbent did so?

"[C]riminal law is ultimately concerned with ascribing criminal responsibility for discrete events. This is done by defining crimes, for example, first degree murder, and by determining who will be responsible for those crimes, for example, aider and abettors and direct perpetrators. Once the discrete event is identified, for example, the killing of a particular human being, the theory each individual juror uses to conclude the defendant is criminally responsible need not be the same and, indeed, may be contradictory." (*People v. Davis* (1992) 8 Cal.App.4th 28, 45.)

Here, the discrete criminal event was the attempted murders of Harrison, Watson, and Dorral when Broadbent fired his gun into their car. The jury did not have to agree whether Diaz told Broadbent to "go get a gun," lulled the victims into a

false sense of security while Broadbent did so, or both, to find him criminally responsible, as long as each individual juror reached that conclusion of criminal responsibility one way or another. No unanimity instruction was required.

B

CALCRIM No. 403 -- Natural And Probable Consequences

Under the natural and probable consequences doctrine, "'A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime.'" (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

Here, the court instructed the jury on the natural and probable consequences doctrine pursuant to CALCRIM No. 403, as follows:

"Before you may decide whether the defendant is guilty of attempted murder based on the theory that he aided and abetted someone else who committed the crime, you must decide whether he is guilty of brandishing a firearm or assault with a firearm. The crimes of brandishing a firearm and assault with a firearm are defined elsewhere in these instructions.

"To prove that a defendant is guilty of attempted murder, the People must prove that:

"1. The defendant is guilty of brandishing a firearm or assault with a firearm;

"2. During the commission of the brandishing a firearm or assault with a firearm the crime of attempted murder was committed; and

"3. Under all of the circumstances a reasonable person in the defendant's position would have known that the commission of the attempted murder was a natural and probable consequence of the commission of the brandishing of a firearm or assault with a firearm.

"A natural and probable consequence is one that a reasonable person knows is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the attempted murder was committed for a reason independent of the common plan to commit the brandishing a firearm or assault with a firearm, then the commission of attempted murder was not a natural and probable consequence of brandishing a firearm or assault with a firearm.

"To decide whether a crime of attempted murder was committed, please refer to the separate instructions that I will give you on that crime.

"The People are alleging that the defendant originally intended to aid and abet either brandishing a firearm or assault with a firearm.

"The defendant is guilty of attempted murder if you decide that the defendant aided and abetted one of those crimes and that attempted murder was the natural and probable result of one

of these crimes. However, you do not need to agree about which of these crimes the defendant aided and abetted."

Diaz complains that, contrary to the natural and probable consequences doctrine, CALCRIM No. 403 "does not require that the [aider and abettor] aided and abetted the actual perpetrator in the target crimes. . . . [¶] All CALCRIM [No.] 403 requires is that the [aider and abettor] aided or abetted someone in the target crime."

In making this argument, Diaz ignores CALCRIM Nos. 400 and 401, which the jury also received. CALCRIM No. 400 told the jury that "[a] person may be guilty of a crime" if he "aided and abetted a perpetrator who directly committed the crime." CALCRIM No. 401 told the jury that "[t]o prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime the defendant intended to aid *the perpetrator* in committing the crime; and [¶] 4. The defendant's words or conduct did, in fact, aid and abet *the perpetrator's* commission of the crime. [¶] Someone aids and abets a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to and does, in fact, aid, facilitate, promote, encourage or instigate *the perpetrator's* commission of that crime." (Italics added.)

"In assessing [a] defendant's claim of [instructional] error, we consider the entire charge to the jury and not simply

the asserted deficiencies in the challenged instruction." (*People v. Lewis* (2001) 25 Cal.4th 610, 649.) Taken together, CALCRIM Nos. 400, 401, and 403 informed the jurors that to find Diaz guilty of attempted murder under the natural and probable consequences doctrine, they had to first find he intended to and did, in fact, aid and abet the *perpetrator's* commission of either brandishing a firearm or assault with a firearm. Thus, Diaz's claim of error in CALCRIM No. 403 is without merit.

C

CALCRIM No. 600 – The "Kill Zone" Instruction

The court instructed the jury on attempted murder pursuant to CALCRIM No. 600, in relevant part as follows:

"The defendants are charged in Counts 1, 2 and 3 with attempted murder.

"To prove that the defendants are guilty of attempted murder, the People must prove that:

"1. The defendants took at least one direct but ineffective step toward killing another person; and

"2. The defendants intended to kill that person.

"[¶] . . . [¶]

"A person may intend to kill a specific victim or victims at the same time he intends to kill anyone in a particular zone of harm or kill zone. In order to convict a defendant of the attempted murder of Anthony Watson, Dorral Hicks or Tyke[y]mo Harrison, the People must prove that the defendant intended to kill Anthony Watson, Dorral Hicks or Tyke[y]mo Harrison, or intended to kill anyone within the kill zone. If you have a

reasonable doubt whether the defendant intended to kill Anthony Watson, Dorral Hicks or Tyke[y]mo Harrison by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Anthony Watson, Dorral Hicks or Tyke[y]mo Harrison."

Diaz contends the last paragraph of the instruction (the "kill zone" paragraph) violated his state and federal constitutional rights to due process and a fair trial because it "did not apply to the facts of the case, misled the jury, [and] lowered the prosecution's burden of proof as to the required specific intent beyond a reasonable doubt." Broadbent contends the kill zone paragraph "misstates the applicable law," erroneously "name[d] the same three victims and primary targets and kill zone targets" and "allowed the jury to convict [him] of attempted murder . . . even if [he] was not shooting at anyone in particular and there was no 'primary' target at all," and "contained an irrational permissive inference." In a related argument, Broadbent contends he received ineffective assistance of counsel when his attorney failed to object to the prosecutor's argument that he "could be convicted on three counts of attempted murder, even if he only intended to kill one person."

1. *People v. Bland*

The "kill zone" paragraph of CALCRIM No. 600 derives from *People v. Bland* (2002) 28 Cal.4th 313. In *Bland*, the court explained that the doctrine of transferred intent applies to the crime of murder but not to "an inchoate crime like attempted

murder" because "[s]omeone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder--due to transferred intent--if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Id.* at pp. 317, 328.) The court went on to explain that "[t]he conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them. . . . [T]he person might still be guilty of attempted murder of everyone in the group, although not on a transferred intent theory. . . . [¶] . . . [A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the 'kill zone.'" (*Id.* at p. 329.) The court noted that "[t]his concurrent intent theory is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Id.* at p. 331, fn. 6.)

2. *Evidentiary Support For The "Kill Zone" Instruction*

With this understanding of the "kill zone" or "concurrent intent" theory of attempted murder in mind, we turn to defendants' argument, beginning with Diaz's. Diaz contends the kill zone instruction was inappropriate here because "[t]he 'kill zone' principle appears to consist of two different elements: 1) a primary target; and 2) a manner of assault reasonably designed to ensure the death of the primary target by creating a lethal zone around the target, thus concurrently intending death to all within the 'kill zone' in order to make sure the intended target is killed." He asserts that "[n]either of those elements is present" here. He contends, "There was no evidence . . . that the bullets were intended to strike anyone in particular in the vehicle; to the contrary, the evidence was that the shots were fired indiscriminately at all occupants of the car." Moreover, "the shooter did not . . . employ[] a manner of assault, such as firing over fifty rounds of high-powered ammunition, that would result in the death of the primary target and those close by."

The People contend the evidence supported an inference that all three named victims were Broadbent's primary targets and that "the instruction gave the jury the opportunity to find that either Anthony, Dorral, or Tykeymo, or all of them, were the primary targets." The People also contend that the amount of "firepower" is not dispositive of whether a kill zone was created or whether the kill zone instruction is warranted in a particular case.

We agree with the People on both points. Where (as here) a person fires, from close range, six to eight shots from a firearm at an automobile that more than one person is in (or getting into), there is a sufficient evidentiary basis to conclude a "kill zone" has been created because, under these facts, the shooter could harbor the intent to kill everyone within the automobile (or at least as many as he can). Thus, the "manner of assault" Broadbent employed justified a "kill zone" instruction.

Additionally, on the facts of this case it was for the jury to decide whether Broadbent had one or more primary targets within the "kill zone." There was evidence that Harrison, Dorral, and Watson left the car and met Diaz in the street, while Dorrate and Gaut remained by the car. From this evidence, the jury could have concluded all three of the victims who confronted Diaz, or some combination of them, were Broadbent's primary targets.

More importantly, it was not critical to the application of the "kill zone" instruction that the jury identify one or more primary targets. If the jury, applying the "kill zone" instruction, found that Broadbent intended to kill everyone inside (or getting into) the car, then the jury necessarily found that Broadbent intended to kill each of the three victims, whether any of them was the primary target. (See *People v. Stone* (2009) 46 Cal.4th 131, 140 ["a person who intends to kill can be guilty of attempted murder even if the person has no

specific target in mind. An indiscriminate would-be killer is just as culpable as one who targets a specific person"].)

In summary, Diaz has failed to show any error in the giving of the "kill zone" instruction. Accordingly, we turn to Broadbent's arguments.

3. *Elimination Of Intent To Kill*

Broadbent first contends "CALCRIM No. 600 misstates the applicable law by describing the 'kill zone' theory [a]s an alternative way to satisfy the mental element of the offense [of attempted murder] that can be used even if the jury cannot find a specific intent to kill every named victim." Broadbent premises this argument on the use of the word "or" in the instruction, where (in this case) the instruction told the jury, "In order to convict a defendant of the attempted murder of Anthony Watson, Dorral Hicks or Tyke[y]mo Harrison, the People must prove that the defendant intended to kill Anthony Watson, Dorral Hicks or Tyke[y]mo Harrison, *or* intended to kill anyone within the kill zone." (Italics added.)

Contrary to Broadbent's argument, as given here CALCRIM No. 600 did not tell the jury "an actual specific intent to kill the victim is not required if the kill zone theory applies." First, the instruction told the jury that to prove defendants were guilty of attempted murder, the People had to prove that defendants took a direct step toward killing another person and "intended to kill *that* person." (Italics added.) The "kill zone" portion of the instruction then informed the jury that "[a] person may intend to kill a specific victim or victims *at*

the same time he intends to kill anyone in a particular zone of harm or kill zone." (Italics added.) The instruction explained that the People had to prove defendants intended to kill Watson, Dorral, or Harrison, "or . . . anyone in the kill zone."[12] Finally, the instruction informed the jury that it had to acquit if it had a reasonable doubt whether defendant intended to kill Watson, Dorral, or Harrison "by harming everyone in the kill zone."[13]

Taken as a whole, the instruction did not substitute the concept of a "kill zone" for the requirement of a specific intent to kill the named victims. Rather, the instruction properly conveyed the idea that if defendants intended to kill everyone in, or getting into, the car -- which was plainly the "kill zone" in this case -- then they necessarily intended to kill the named victims, who were all shot while in that "kill zone." As given here, CALCRIM No. 600 did not misstate the law.

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12 Our Supreme Court has recognized that while the instruction would be more clear if it used the word "everyone" instead of the word "anyone," "In context, a jury hearing about the intent to kill *anyone* within the kill zone would probably interpret it as meaning the intent to kill *any* person who happens to be in the kill zone, i.e., *everyone* in the kill zone." (*People v. Stone*, *supra*, 46 Cal.4th at p. 138, fn. 3.)

13 Our Supreme Court has also recognized that "[b]ecause the intent required for attempted murder is to kill rather than merely harm, it would be better for the instruction to use the word 'kill' consistently rather than the word 'harm.'" (*People v. Stone*, *supra*, 46 Cal.4th at p. 138, fn. 3.)

4. *Primary Target Requirement*

Broadbent next argues that a "kill zone" instruction requires "[t]he identification of a primary target," and here "[i]t was error to name the same three individuals as primary targets and kill zone targets." Thus, in his view, "the [kill zone] instruction was both erroneously worded and inapplicable to the facts of this case."

We have largely disposed of this argument already in rejecting Diaz's challenge to the "kill zone" instruction. On the facts of this case, it was for the jury to decide whether Broadbent had one or more primary targets within the "kill zone" of the car, and if he did, who those targets were. Broadbent points to no authority to support his suggestion that the jury cannot be allowed to decide what person or persons were the primary target, assuming there was one. Moreover, as we have concluded already, identification of a primary target is not critical to application of the "kill zone" theory. What is central to the idea of a "kill zone" is the use of a means of killing that is directed at an area where more than one person is present and that has the ability to kill more than one person. In such a situation, a jury may infer that the defendant intended to kill everyone -- or at least as many persons as he possibly could -- within that "kill zone" and thus may find the defendant guilty of as many counts of attempted murder as there were persons within the "kill zone" that the defendant tried to kill.

Broadbent complains that if no primary target is required, then the "kill zone" theory "would apply whenever someone shoots indiscriminately into a group," which would be error "because 'an attempted murder is not committed as to all persons in a group simply because a gunshot is fired indiscriminately at them.'" (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 392.) This assertion may be true where *a* gunshot is fired. (See *People v. Stone*, *supra*, 46 Cal.4th at p. 138 [concluding "[t]he kill zone theory simply does not fit" where the defendant was charged with one count of attempted murder for firing a single gunshot at a group].) But it is not true where -- as here -- multiple gunshots are fired and multiple counts of attempted murder are charged.

Addressing the "kill zone" theory, the Court of Appeal in *Anzalone* concluded that "to be found guilty of attempted murder, the defendant must either have intended to kill a particular individual or individuals or the nature of his attack must be such that it is reasonable to infer that the defendant intended to kill everyone in a particular location as the means to some other end, e.g., killing some particular person." (*People v. Anzalone*, *supra*, 141 Cal.App.4th at p. 393.) More recently, however, the Supreme Court explained that "[a]lthough a primary target often exists and can be identified, one is not required." (*People v. Stone*, *supra*, 46 Cal.4th at p. 140.) Thus it follows that a person can be found guilty of attempted murder if the nature of his attack is such that it is reasonable to infer he intended to kill everyone in a particular location, whether

there was some other end involved. And under the "kill zone" theory, there can be as many charges of attempted murder as there are potential victims.

Here, Broadbent fired six to eight shots into a car containing (or about to contain) five persons; he and Diaz were subsequently charged with three counts of attempted murder -- one for each person struck by a bullet. Under these circumstances, the jury was properly instructed on the "kill zone" theory, even if there was no primary target.

5. *Irrational Permissive Inference*

Broadbent next argues that "[t]he 'kill zone' portion of CALCRIM No. 600 erroneously eliminated the need to find a specific intent to kill each named victim by giving the jury the option to apply an irrational permissive inference as an alternative way to find an implied intent to kill others, based on their presence in the so-called 'kill zone.'" In Broadbent's view, if the jury could not find an actual intent to kill the named victim, the instruction nonetheless allowed the jury to "infer an implied intent to kill based on" "where the victims are situated." Broadbent contends the instruction thus violates due process.

We have concluded already that, taken as a whole, the attempted murder instruction here did not offer the concept of a "kill zone" as an alternative to the requirement of a specific intent to kill the named victims. Rather, the instruction properly conveyed the idea that if defendants intended to kill

everyone in the "kill zone" of the car, then they necessarily intended to kill the named victims, who were in that zone.

Moreover, "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*People v. Mendoza* (2000) 24 Cal.4th 130, 180.) CALCRIM No. 600 does not run afoul of this principle because the instruction does not tell the jury that it can find an implied intent to kill based solely on the victim's presence in an "imaginary area" known as the "kill zone." Rather, the instruction properly tells the jury (in the words of the Supreme Court in *Bland*) that "a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*People v. Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6.) Whether the jury decides to find a concurrent intent to kill multiple victims located within a given "zone" is something left to the jury based on all of the evidence before it. Nothing about the "kill zone" portion of CALCRIM No. 600 permits or encourages the jury to draw an irrational inference in this regard, and therefore the instruction does not violate due process.

6. *Ineffective Assistance Of Counsel*

Finally, we turn to Broadbent's claim of ineffective assistance of counsel relating to the prosecutor's argument about the "kill zone" theory. At first, the prosecutor argued, "I'll submit to you if you stand within a few feet of a car and you empty a gun and you fill that car up with lead and you empty your gun, you are trying to kill everyone in it." But then the

prosecutor continued, addressing "something that we call the kill zone." On that, she argued as follows:

"This is where -- this exists and this is the law that is often applied when a person intends to kill one person and he's aware that people are in close proximity to his intended target, they are so close that the law is and you determine that they have concurrent intent. That's what it is.

"It doesn't matter if you feel that Jam[u]al Broadbent intended to kill everyone individually in that car. Maybe he intended only to kill [Harrison] or Dorral or [Watson]. The other shots followed. Concurrent intent. He's charged with three counts, not the full six. He could have been charged with the six. Clearly the same intent was there. Concurrent intent on the other victims. You'll see it. You'll read it. You can talk about it.

"You'll see this whenever you have a crowd of people, somebody drives by, does a drive-by, shoots into a crowd of folks intending to kill one guy, knows the danger involved, find concurrent intent at the same time he tries to kill that person."

As Broadbent argues, the prosecutor's argument erroneously suggested that defendants did not have to intend to kill all three victims to be convicted of attempting to murder all three of them. Broadbent asserts that his trial attorney's failure to object to the prosecutor's erroneous argument, and failure to "disabuse the jury of the prosecutor's erroneous argument during

the defense summation," constituted ineffective assistance of counsel.

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. . . . Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.)

In asserting that his trial attorney's failure to object to the prosecutor's erroneous argument regarding the "kill zone" theory prejudiced him, Broadbent does not attempt to frame an argument rooted in the facts and circumstances of this case. Instead, he simply offers a quote from *Anzalone*,[14] and concludes, "The same is true here." That does not suffice.

In *Anzalone*, the defendant was charged with four counts of attempted murder for shooting twice at a group of four men

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[14] The quote is this: "Counsel should have objected to the prosecutor's misstatements of the law and in failing to do so provided ineffective assistance. [¶] We conclude that had counsel objected there is a reasonable probability the results of the proceeding would have been different. The prosecutor left the jury with the mistaken impression that by firing indiscriminately in the direction of a group of men, appellant was guilty of attempting to kill them all. This greatly lessened the People's burden of proof. Given the nature of the shooting, had the prosecutor's misstatement of the law been corrected after an objection, it is reasonably probable the jury would not have found appellant guilty of all four counts of attempted murder." (*People v. Anzalone*, *supra*, 141 Cal.App.4th at p. 395.)

standing near a car. (*People v. Anzalone*, *supra*, 141 Cal.App.4th at pp. 383-385.) Unlike here, the trial court did *not* instruct on the "kill zone" theory of concurrent intent, but the prosecutor argued that theory, telling the jury -- erroneously -- that "'[a]nytime someone is within the zone of danger, whether it be one, two, three or twenty people, somebody indiscriminately shoots toward a crowd of people, everything in that zone of danger qualifies. . . . That is how we get to the four counts of attempted murder.'" (*Id.* at pp. 390-391.)

The Court of Appeal noted that "[t]he prosecutor's argument incorrectly suggest[ed] that a defendant may be found guilty of the attempted murder of someone he does not intend to kill simply because the victim is in some undefined zone of danger." (*People v. Anzalone*, *supra*, 141 Cal.App.4th at pp. 392-393.) The court then concluded that trial counsel's failure to object to the erroneous argument was prejudicial because "[t]aking the court's proper instructions and the prosecutor's erroneous argument together, the jury would have reasonably understood that to find attempted murder it was required to find appellant intended to kill at least one of the men standing by the car; but once it did so, it could find appellant guilty of three additional counts of attempted murder simply because the other victims were in the 'zone of danger.'" (*Id.* at p. 396.)

In arguing that what was true in *Anzalone* "is true here," Broadbent fails to recognize that the trial court here, unlike the trial court in *Anzalone*, *did* instruct the jury on the "kill zone" theory of concurrent intent. Moreover, as detailed above,

we have found no error in the court's instruction on that subject because the instruction properly conveyed the idea that if defendants intended to kill everyone in the "kill zone" of the car, then they necessarily intended to kill the named victims, who were in that zone. Thus, this case is not comparable to *Anzalone*, where the only guidance the jury received on the "kill zone" theory was the prosecutor's erroneous argument.

There were other material differences in the attempted murder instructions in the two cases also. Here, unlike in *Anzalone* (see *People v. Anzalone*, *supra*, 141 Cal.App.4th at p. 390), the trial court instructed the jury that to prove defendants were guilty of attempted murder, the People had to prove defendants took a direct step toward killing another person and "intended to kill *that* person." (Italics added.) "Absent evidence to the contrary, we must assume that the jury followed the court's instructions." (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 409.) Indeed, "The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

Here, given that the trial court's "kill zone" instruction -- which the jury received *after* the prosecutor's erroneous argument -- was correct, and given the unrebutted assumption that the jury understood and followed the instruction (instead of the erroneous argument that preceded it), we see no reasonable probability the result would have been different if

Broadbent's trial attorney had objected to the prosecutor's argument. Accordingly, his ineffective assistance of counsel claim fails.

V

Sufficiency Of The Evidence

A

Natural And Probable Consequences Doctrine

Diaz contends there was insufficient evidence to convict him of attempted murder "[b]ecause there was insufficient evidence that the attempted murders were the natural and probable consequence of . . . brandishing a gun and/or assault with a weapon." We disagree.

In Diaz's view, "Attempted murder is not a natural and probable consequence of brandishing a firearm, or assault with a weapon, unless the defendant had reason to believe that the person to whom he directed the comment 'get a gun' would actually act upon that comment; would retrieve a gun; would load it (if not yet loaded); and would use it to shoot at a person." He contends that while there may have been evidence he called out "get a gun," "There was no evidence that this was directed at Broadbent. Nor is there evidence that [he] knew that any gun located nearby would be loaded; or that Broadbent would utilize a gun to approach the occupants of the car (after the apparent initial misunderstanding had been resolved) and open fire upon the occupants."

This argument ignores the substantial evidence standard of review and Diaz's burden in asserting insufficiency of the

evidence. "[T]o prevail on a sufficiency of the evidence argument, the defendant . . . must set forth in his opening brief *all* of the material evidence on the disputed elements of the crime in the light most favorable to the People, and then must persuade us that evidence cannot reasonably support the jury's verdict." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.) A defendant cannot "show the evidence is insufficient by citing only his own evidence, or by arguing about what evidence is *not* in the record, or by portraying the evidence that is in the record in the light most favorable to himself." (*Id.* at p. 1573.)

Here, there was evidence from which the jury could have found that Diaz turned to Broadbent and another man and told them, "Go get the gun"; the two men left to get the gun, and while they did so Diaz acted like there was no problem and "everything was cool"; then the two men returned with Broadbent in the lead carrying a gun; and Broadbent emptied the gun into the car where the victims were. There was also expert opinion evidence that Diaz and Broadbent were both members of the Ridezilla gang; that Ridezilla is a very violent gang, the members of which "are very, very often armed, and . . . are not afraid to use them"; and that "[t]he rivals of Ridezilla are anyone who challenges Ridezilla." There was also expert opinion evidence that if one Ridezilla member told another Ridezilla member to go get a gun in a situation like the one that occurred in this case, it would never be expected that the gang member

retrieving the gun would only point or brandish the gun without firing it.

"The test for an aider and abettor's liability for collateral criminal offenses . . . is objective; it is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.) "In criminal law, as in tort law, to be reasonably foreseeable '[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . .'" (*Ibid.*) Furthermore, the test "is case specific, that is, it depends upon all of the facts and circumstances surrounding the particular defendant's conduct." (*Ibid.*)

On all of the evidence in this case, there was a more than sufficient basis for the jury to find that a reasonable person in Diaz's position would have or should have known it was reasonably possible that, when told to "go get the gun," Broadbent would, upon his return, not only brandish it or assault the victims with it, but would actually fire the gun and try to kill the victims. Thus, Diaz's challenge to the sufficiency of the evidence supporting application of the natural and probable consequences doctrine fails.

B

Causation

Diaz contends there was insufficient evidence to convict him of attempted murder as an aider and abettor because there was insufficient "[p]roof that [his] conduct was the legal or proximate cause of" the shooting of Harrison, Watson, and Dorral. Arguing that an act is a proximate cause of a result only if the result would not have occurred but for the act, he contends there was uncontradicted testimony from the gang expert that the shooting would have occurred even if he had not told Broadbent to "go get the gun," and "[t]herefore there was insufficient evidence that [his] action was a legal proximate cause of the attempted murder[s]."

We reject Diaz's causation argument for two reasons. First, in support of his argument Diaz cites a number of inapposite cases that dealt with crimes (mostly, but not exclusively, types of homicide) in which the death of the victim was an element of the crime. (E.g., *People v. Cervantes* (2001) 26 Cal.4th 860 [murder]; *People v. Harris* (1975) 52 Cal.App.3d 419 [vehicular manslaughter]; *People v. Armitage* (1987) 194 Cal.App.3d 405 [drunk boating causing death].) In such cases, a proximate causal link between the criminal act and the victim's death is an essential element of the crime. (See, e.g., *Cervantes*, at p. 866 [addressing "the essential element [of] proximate causation in the context of a provocative act murder prosecution"].) But Diaz does not cite *any* case supporting the proposition that such a causal link must exist when the crime

charged does not include the death of the victim as an element and where the defendant is charged as an aider and abettor. In other words, Diaz cites no authority for the proposition that an aider and abettor's act must be a proximate cause of the crime the perpetrator commits for the aider and abettor to be held responsible for the crime. Absent such authority, Diaz's argument is not well taken.

Second, even assuming arguendo Diaz were correct on the law and such a causal link must exist, his sufficiency of the evidence argument still fails. During redirect examination, the prosecutor asked Detective Brown various hypothetical questions based on the evidence. At one point, the prosecutor asked what, in her opinion, was likely to happen if two U.Z. gang members were at "a dope selling corner" with a gun accessible to them, and "a car rolls up and there's five people inside and . . . four occupants jump out of the car. And they walk toward one of the U.Z. gang members yelling relatively aggressive words." Detective Brown responded, "Well, it depends, it depends on the rest of the situation. If somebody's got a gun, somebody's most likely gonna get shot . . . ." She later said, "this situation is not going to end good no matter what. Especially if somebody has a gun, there's going to be some gun play in there."

In Diaz's view, this "uncontradicted evidence from the gang expert" established that the shooting would have occurred no matter what he did and therefore he was not a proximate cause of the shooting. Even if Diaz's characterization of Detective Brown's testimony is correct, however, the jury was not bound to

accept her opinion that the shooting was inevitable. The jurors in a criminal case must be instructed that they are "not bound to accept the opinion of any expert as conclusive, but should give to [the opinion] the weight to which they shall find it to be entitled" and "may . . . disregard any such opinion, if it shall be found by them to be unreasonable." (§ 1127b.) The jury here received such an instruction.[15] Thus, for all we know, the jury rejected this portion of Detective Brown's testimony and instead concluded the shooting would not have occurred if Diaz had not told Broadbent to "go get the gun."

In his reply brief, Diaz argues it would be "simply unreasonable to posit that the jury would have accepted the majority of the expert's testimony on the behavior and history of gangs, but for some unexplained reason would have rejected the expert's testimony that . . . the shootings would have occurred no matter what [he] did or said." But he makes no attempt to explain *why* this would have been unreasonable, and his mere ipse dixit statement that it would have been is not enough to carry the day on appeal. Accordingly, we reject Diaz's causation argument.

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[15] "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. . . . You may disregard any opinion that you find unbelievable, unreasonable or unsupported by the evidence."

VI

Presentence Custody Credits

At sentencing, the trial court stated that Broadbent was entitled to "788 days credit [for] time served." This was based on the clerk's statement that he had "686 actual days" and "102 good-time days."

On appeal, Broadbent contends he is entitled to one additional day of actual custody credit and one additional day of conduct credit because the clerk erred in calculating the time of his incarceration from January 18, 2006, rather than from January 17, 2006. The People agree, and so do we.

The first page of Broadbent's probation report identifies the date of his arrest as January 18, 2006. In the body of the report, however, it states he was taken into custody on January 17, 2006. This latter date is consistent with Detective Brown's trial testimony that she arrested Broadbent on January 17.

Broadbent was sentenced on December 4, 2007. That means he was in custody for 687 days between arrest and sentencing, not 686 days as the trial court clerk stated. Broadbent is entitled to credit for 687 actual days of custody plus 103 days in conduct credits,[16] rather than the 686/102 days the trial court calculated.

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[16] A person convicted of attempted murder "shall accrue no more than 15 percent of worktime [i.e., conduct] credit." (§§ 2933.1, subds. (a) & (c), 667.5, subd. (c)(12).) Fifteen percent of 687 is 103.05.

An error in the calculation of presentence custody credits may be corrected whenever it is discovered. (See *People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) Thus, we shall modify Broadbent's jugment to include two additional days of credit.

DISPOSITION

The Diaz judgment is affirmed. The Broadbent judgment is modified to award him 687 days of "actual" credit, 103 days of "local conduct" credit, and "total credits" of 790. As modified, the Broadbent judgment is affirmed. The trial court is directed to amend the Broadbent abstract of judgment to reflect the modification, and send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

ROBIE, J.

I concur:

NICHOLSON, J.

Under the compulsion of *People v. Stone* (2009) 46 Cal.4th 131, I concur in the results reached in part IV C of the opinion, "CALCRIM No. 600 -- the 'kill zone' instruction." In all other respects, I fully concur in the opinion.

SCOTLAND, P. J.